

**Modjtaba Hosseinzadeh Majid v Public Prosecutor and
another appeal**

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS
B-05-74-03 OF 2013 (IRN) AND B-05-75-03 OF 2013 (IRN)
MOHTARUDIN BAKI, TENGKU MAIMUN AND ABANG ISKANDAR
JJCA
10 JUNE 2015

*Criminal Procedure — Dangerous drugs — Trafficking — Accused persons
swallowed 160 capsules containing methamphetamine before taking flight to
Malaysia from Tehran — Whether defence they did not know capsules contained
impugned drugs rejected — Whether allegation man in Iran told accused capsules
contained medication to be given to recipient in Malaysia for fee implausible
— Whether man in Iran fictitious person created to bolster defence's story
— Whether accused proven to have had knowledge of drugs — Whether
presumption of trafficking unrebutted*

The two appellants herein ('Modjtaba' and 'Hamid') were stopped by police at the Kuala Lumpur International Airport ('KLIA') shortly after they arrived from Tehran and were taken to hospital where an x-ray of their abdomen showed the presence of unusual objects. The duo were given medication to flush out those objects which were eventually found to be capsules containing methamphetamine, a dangerous drug under the Dangerous Drugs Act 1952 ('the DDA'). Modjtaba purged 60 capsules containing 259.4g of methamphetamine whilst Hamid purged 80 capsules containing 343.5g of that drug. The two men were charged and tried in the High Court under s 39B(1)(a) of the DDA for trafficking in the methamphetamine and at the end of the trial, they were found guilty and sentenced to death. The common ground in their instant appeals against conviction and sentence was that they were 'innocent carriers' and did not know the capsules contained methamphetamine. Modjtaba's defence was that he was told by a friend in Tehran, one Abu Dzal, shortly before he boarded the flight, that the capsules contained a kind of 'shisha' that was to be delivered to an individual in Malaysia for which service Modjtaba would be paid. Similarly, Hamid contended Abu Dzal had told him the capsules contained dental medication and that he would be paid if he delivered them to an individual in Malaysia. Both appellants said the swallowing of the capsules was to avoid payment of customs tax. They also alleged that when they were arrested they told police about Abu Dzal but no steps were taken by police to track down and question Abu Dzal. In addition, Hamid, inter alia, alleged that the charge against him was defective and that there was doubt as to the identity of the drugs in the capsules because after the

A capsules were obtained, the plastic packets that were used to wrap the capsules were not dated and signed.

Held, dismissing both appeals and affirming the convictions and sentences:

- B (1) The trial judge had not committed any error that warranted curial intervention. He had correctly addressed the pertinent issues that were before him and had employed the correct burden of proof that was applicable to both the prosecution and on the appellants. Ultimately, the trial judge found that both the appellants had failed to raise any reasonable doubt on the prosecution's case especially on the factum of possession of the impugned drugs. The manner in which the trial judge dealt with the issue of knowledge and his conclusion that both appellants had the requisite knowledge to found possession under s 37(d) of the DDA was correct. The trial judge was also satisfied, on careful deliberation of the defence, that both appellants had failed to rebut the presumption of trafficking invoked against them under s 37(da)(xvi) of the DDA. He was satisfied that the prosecution had proven its case against the appellants beyond reasonable doubt (see paras 30 & 69).
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- E (2) The trial judge came to the conclusion that Abu Dzal was a fictitious person, conveniently created by the appellants as an afterthought. It was incredible that neither of the appellants was able to furnish the full name and basic particulars of Abu Dzal to the investigating officer and yet they expected the latter to launch a full scale investigation into tracking down the so-called Abu Dzal in Iran. This court agreed with the trial judge that Abu Dzal was an invention and a figment of the appellants' imagination (see paras 24 & 59).
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- G (3) The trial in respect of Hamid's case was not a nullity. Where the statute under which an accused person was charged required prior consent to prosecute, even a failure to tender the requisition and consent when the accused was charged in court would not be fatal so long as the charging and prosecution was done by a deputy public prosecutor ('DPP'). In the instant case, the charging and prosecution of Hamid were done by a DPP, the statutory alter ego of the public prosecutor, hence the consent to prosecute Hamid as per the ultimate charge that was preferred against him was therefore implicit (see paras 31–32).
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- I (4) In the light of evidence pertaining to the chain of evidence, in particular, the cumulative effect of the evidence coming from SP7, SP14 and SP4, Hamid's complaint that there was a break in the chain pertaining to the drugs exhibits was devoid of merit. The appellants did not dispute that the capsules contained methamphetamine, nor did they dispute the weight of the drugs. It was the quality of the identification of the exhibits by the witnesses in court that mattered, not the quantity or number of kinds of markings that were put on the exhibits. The purpose of putting

a marking on an exhibit was solely for purpose of identification later in court if the need arose. There was no hard and fast rule that there had to be placed on all exhibits the signature and date by a witness who had handled them earlier (see paras 36, 38 & 41).

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[Bahasa Malaysia summary]

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Kedua-dua perayu di sini ('Modjtaba' dan 'Hamid') ditahan oleh polis di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') sejurus selepas mereka tiba daripada Tehran dan dibawa ke hospital di mana x-ray di abdomen mereka dilakukan dan ia menunjukkan kehadiran objek yang luar biasa. Kedua-dua orang tersebut diberikan ubat untuk mengeluarkan objek-objek tersebut yang kemudiannya didapati merupakan kapsul-kapsul mengandungi methamphetamine, dadah berbahaya di bawah Akta Dadah Berbahaya 1952 ('ADB'). Modjtaba mengeluarkan 60 kapsul-kapsul mengandungi 259.4g methamphetamine manakala Hamid mengeluarkan 80 kapsul-kapsul mengandungi 343.5g dadah tersebut. Kedua-dua lelaki itu dipertuduh dan dibicarakan di Mahkamah Tinggi di bawah s 39B(1)(a) ADB kerana mengedar methamphetamine dan pada penutup perbicaraan, mereka didapati bersalah dan dijatuhi hukuman mati. Titik persamaan dalam rayuan mereka ini terhadap sabitan dan hukuman adalah bahawa mereka adalah 'pembawa yang tidak bersalah' dan tidak tahu kapsul-kapsul tersebut mengandungi methamphetamine. Pembelaan Modjtaba adalah bahawa dia telah diberitahu oleh seorang kawan di Tehran, Abu Dzal, sejurus sebelum dia menaiki penerbangan, bahawa kapsul-kapsul tersebut mengandungi sejenis 'shisha' yang perlu diserahkan kepada seorang individu di Malaysia di mana perkhidmatan Modjtaba akan dibayar. Begitu juga, Hamid menegaskan Abu Dzal memberitahunya bahawa kapsul-kapsul tersebut mengandungi ubat gigi dan bahawa dia akan dibayar jika mereka menyerahkan kapsul-kapsul tersebut kepada seorang individu di Malaysia. Kedua-dua perayu mengatakan menelan kapsul-kapsul adalah untuk mengelakkan pembayaran cukai kastam. Mereka juga mendakwa bahawa apabila mereka ditangkap mereka memberitahu polis mengenai Abu Dzal tetapi tiada langkah telah diambil oleh pihak polis untuk mengesan dan menyoal Abu Dzal. Tambahan pula, Hamid, antara lain, mendakwa pertuduhan terhadapnya adalah cacat dan bahawa terdapat keraguan tentang identiti dadah dalam kapsul-kapsul kerana selepas kapsul-kapsul tersebut diperolehi, paket plastik yang digunakan untuk membalut kapsul-kapsul tersebut tidak bertarikh dan ditandatangani.

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Diputuskan, menolak kedua-dua rayuan dan mengesahkan sabitan dan hukuman:

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- (1) Hakim perbicaraan tidak melakukan apa-apa kesilapan yang mewajarkan campur tangan kurial. Beliau dengan tepat menangani isu-isu penting yang dikemukakan kepada beliau dan telah menggunakan beban bukti yang tepat yang terpakai kepada kedua-dua pihak pendakwaan dan

- A perayu. Akhirnya, hakim perbicaraan mendapati bahawa kedua-dua perayu telah gagal menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan terutamanya berhubung kejadian pemilikan dadah dipersoalkan. Cara di mana hakim perbicaraan menguruskan isu pengetahuan dan kesimpulan beliau bahawa kedua-dua perayu mempunyai pengetahuan yang diperlukan untuk memiliki didapati di bawah s 37(d) DDA adalah tepat. Hakim perbicaraan juga berpuas hati, selepas pertimbangan teliti pembelaan, bahawa kedua-dua perayu gagal mematahkan anggapan pengedaran yang digunakan ke atas mereka di bawah s 37(da)(xvi) ADB. Beliau berpuas hati bahawa pihak pendakwaan berjaya membuktikan kes mereka terhadap perayu melampaui keraguan yang munasabah (lihat perenggan 30 & 69).
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- (2) Hakim perbicaraan menyimpulkan bahawa Abu Dzal adalah orang rekaan, mudah dicipta oleh perayu sebagai sesuatu yang difikirkan kemudian. Adalah luar biasa bahawa tiada seorang perayu pun yang dapat memberikan nama penuh dan butir-butir asas Abu Dzal kepada pegawai penyiasat tetapi mereka menyangka pegawai penyiasat akan melancarkan siasatan penuh untuk mengesan seseorang yang dikenali sebagai Abu Dzal di Iran. Mahkamah ini bersetuju dengan hakim perbicaraan bahawa Abu Dzal merupakan ciptaan dan khayalan imaginasi perayu-perayu (lihat perenggan 24 & 59).
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- (3) Perbicaraan berkenaan dengan kes Hamid tidak terbatal. Di mana undang-undang yang di bawahnya seseorang dipertuduh memerlukan persetujuan terlebih dahulu untuk mendakwa, walaupun gagal untuk mengemukakan permintaan dan persetujuan apabila tertuduh dihadapkan ke mahkamah, ini semua tidak menjejaskan selagi pertuduhan dan pendakwaan dilakukan oleh timbalan pendakwa raya ('DPP'). Dalam kes ini, pertuduhan dan pendakwaan Hamid dilakukan oleh seorang timbalan pendakwa raya, alter ego statutori pendakwa raya, dengan itu kebenaran untuk mendakwa Hamid seperti pertuduhan utama yang menjadi dipilih terhadapnya adalah oleh itu tersirat (lihat perenggan 31–32).
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- (4) Dengan mengambil kira bukti yang berkaitan dengan rantaian bukti, khususnya, kesan kumulatif keterangan yang datang daripada SP7, SP14 dan SP4, aduan Hamid bahawa terdapat perpecahan dalam rantaian yang berkaitan dengan ekshibit ubat-ubatan adalah tanpa merit. Perayu-perayu tidak mempertikaikan bahawa kapsul-kapsul tersebut mengandungi methamphetamine dan mereka tidak pula mempertikaikan berat dadah tersebut. Kualiti pengenalan ekshibit-ekshibit oleh saksi-saksi di mahkamah itu yang penting, bukannya kuantiti atau beberapa jenis tanda-tanda yang telah diletakkan di atas ekshibit-ekshibit. Tujuan meletakkan tanda di ekshibit hanyalah untuk tujuan pengenalan kemudian di mahkamah jika timbul
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keperluan. Tiada peraturan ketat dan cepat yang perlu diletakkan ke atas semua ekshibit tandatangan dan tarikh oleh seorang saksi yang mengendalikan ekshibit tersebut terdahulu (lihat perenggan 38, 36 & 41).]

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Notes

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For cases on trafficking, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 2037–2044.

Cases referred to

C

Alcontara all Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Chan Pean Leon v PP [1956] MLJ 237 (refd)

Gunalan all Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)

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Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)

PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

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Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)

PP v Jamali bin Adnan [1985] 1 MLJ 305 (refd)

PP v Mohd Halipah [1982] 1 MLJ 155 (refd)

Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2000] 1 CLJ 381, FC (refd)

Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

F

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Yee Wen Chin v PP & Anor [2008] 6 MLJ 222; [2008] 6 CLJ 773, CA (refd)

Legislation referred to

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Criminal Procedure Code ss 180(1), 422

Dangerous Drugs Act 1952 ss 37(d), 37(da)(xvi), 39B(1)(a)

Penal Code s 34

Appeal from: Criminal Trial Nos 45A-164 of 2011 and 45A-165 of 2011 (High Court, Kuala Lumpur)

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Chong Yin Xin (Thong Seng Kong) for the first appellant.

Suzanawati bt Ismail (Suzana Ismail & Partners) for the second appellant.

Mohd Fairuz bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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A Abang Iskandar JCA (delivering judgment of court):

BRIEF FACTS OF THE CASE

- B** [1] On 6 February 2011, ASP Balachandran a/l Annamalai ('SP5') was on supervisory duty at the KLIA Arrival Hall, Level 3. At about 10am two men were seen wandering around in suspicious manner. He spent about five minutes observing both of them.
- C** [2] He then saw them coming towards the scanning machine with their bags, on their way out. After they had passed their bags through the scanning machine, SP5 then approached them and introduced himself as a police officer together with three other police personnel, to the two men. Then SP5 went on to check their passports. A body inspection was also done on the two men but nothing suspicious was found on them, neither in their bags.
- D** [3] Upon instruction by SP5, both the men were brought to Hospital Serdang for x-ray examination. By this time, the two men were identified as Modjtaba Hosseinzadeh Majid ('Modjtaba') and Hamid Hosseinzadeh Abdolhossein ('Hamid').
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- F** [4] The x-ray examination was conducted by Siti Rohani Din ('SP6'), who testified that she saw images of unusual objects in the abdominal part of both men respectively. According to SP6, those objects ought not to exist there. A flushing out process was done on both men in order to determine what they were. As a result thereof, 60 capsules were excreted from Modjtaba's body, and another 80 capsules came out from Hamid's body.
- G** [5] The said capsules were subsequently sent to the chemistry department for analysis. Based on the chemist analysis, as conducted by Suhana Ismail ('SP4'), it was certified that the 60 capsules found from Modjtaba's body had contained 259.4g of methamphetamine whilst the 80 capsules from Hamid's body had weighed 343.5g of methamphetamine, as well.
- H** [6] Both men were then charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Simply put, each of them was charged separately for an offence of trafficking in the dangerous drugs methamphetamine, which on conviction attracts the mandatory death penalty. They were tried together, but not pursuant to s 34 of the Penal Code, meaning that the prosecution would
- I** have to prove the charge against each of them separately. After a full hearing, the learned High Court judge had found each of them guilty of trafficking in dangerous drugs as per the respective charge, as preferred against each of them.
- [7] The charge against Modjtaba ('the first appellant') had read as follows:

Bahawa kamu antara 6 Februari 2011 jam lebih kurang 5.25 petang sehingga 06 Februari 2011 jam lebih kurang 9 malam, bertempat di tandas bilik no 28, Wad 6C, Hospital Serdang, di dalam daerah Sepang, dalam Negeri Selangor, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 259.4 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

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[8] The charge against Hamid ('the second appellant') had read as follows:

Bahawa kamu antara 06 Februari 2011 jam lebih kurang 3.15 petang sehingga 7 Februari 2011 jam lebih kurang 8.41 malam, bertempat di tandas bilik no 28, Wad 6C, Hospital Serdang, di dalam daerah Sepang, dalam Negeri Selangor, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 343.5 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

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[9] Consequently, the learned High Court judge had sentenced both of them to the mandatory death penalty. Aggrieved by such decision, both Modjtaba and Hamid ('the appellants') had since appealed against that decision by the learned trial judge. Hence the appeals that were heard by us.

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[10] Before us, the appeal of Modjtaba was heard first and it was then followed by the appeal by Hamid.

THE APPEAL BY MODJTABA

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[11] Before us, Ms YX Chong, learned counsel for Modjtaba, had raised three issues which she submitted ought to entitle Modjtaba to an acquittal at the end of the appeal. Those three issues had been:

- (a) there was no knowledge proven on the part of Modjtaba of the drugs;
- (b) that Modjtaba was an innocent carrier; and
- (c) that there was no sufficient appreciation of the defence evidence, in particular, the failure of the investigating officer to investigate one, by the name of Abu Dzal who according to Modjtaba was not a fictitious person.

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[12] It was therefore clear that central to Modjtaba's defence had been that he did not have the requisite knowledge of the drugs found in the 60 capsules. Before us, Ms Chong had submitted that Modjtaba had swallowed the capsules not knowing their contents to be drugs. Instead, he was told by Abu Dzal that the capsules had contained dental medication and that the purpose of swallowing the capsules was to avoid detection such that no customs tax would be payable upon reaching KLIA. Departing from there, it was contended that

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A as there was no knowledge of the impugned drugs on the part of Modjtaba, there could not be any possession by him of the impugned drugs, methamphetamine.

B [13] It was also submitted before us that the evidence as led by the prosecution did not establish any overt act from which the offence of trafficking could be reasonably inferred. The Privy Council decision in the Singapore case of *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 was cited in support for that legal proposition that there must be established some evidence of an overt act from which an inference of trafficking can reasonably be inferred against the accused person. It was submitted before us that there was no such evidence before the trial court in order to premise a finding of trafficking. Miss Chong therefore urged upon this court that the learned trial judge had erred in law and in fact when he found Modjtaba guilty of drug trafficking and when he sentenced Modjtaba to the death sentence by hanging.

THE APPEAL BY HAMID

E [14] On behalf of Hamid, his learned counsel, Puan Suzanawati bt Ismail had raised the following issues before us:

(a) The charge against the second appellant is defective.

F This contention was premised on the fact that the required consent (P-1B) had referred only to one incriminating event on the 7 February 2011 and as a result of that, the amount of the drugs was also different from the one referred to in the penultimate charge (P-2B) that was preferred against Hamid. The said consent also did not refer the whole duration that covered two days as indicated in the charge that was preferred against Hamid. Such consent as (P-1B) therefore could not relate to the charge (P-2B) against Hamid thereby rendering the said charge defective and incapable of being cured under s 422 of the Criminal Procedure Code.

H (b) Identity of the capsules was doubtful.

This issue had related to the Hospital Serdang plastic packets which according to learned counsel were not dated and signed thus casting serious doubts as to the identity of the drugs in the capsules which the plastic packets had contained.

I (c) Non-availability of Persian interpreter.

It was contended that no Persian interpreter was made available to Hamid at the time of arrest and that Hamid could not understand the local language nor the English language.

- (d) The failure to investigate about 'Abu Dzal'.

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The contention pertaining to Abu Dzal being that the capsules were swallowed in Tehran on the instruction of Abu Dzal who told Hamid that the capsules had contained dental medication and that they had to be swallowed to avoid having to pay customs tax on arrival at KLIA, Malaysia. That being the case, the prosecution ought to have investigated Abu Dzal, which it did not. It was the contention of both appellants, Modjtaba and Hamid that Abu Dzal was not a fictitious person. Neither was he a recent invention in their part.

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- (e) Lacking of knowledge about content of the capsules.

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This issue is closely related to the allegation that Abu Dzal told Hamid (and Modjtaba) that the capsules contained dental medication. As such, as there was no knowledge of the impugned drugs on the part of Hamid, there can never be possession of the drugs on his part. That being the case, the issue of trafficking could not arise at all. Hamid must therefore be acquitted of the charge.

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THE PROSECUTION'S SUBMISSIONS

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[15] On the part of the prosecution respondent, Mr Fairuz bin Johari, the learned Mr Deputy submitted before us that the learned trial judge had considered all the relevant evidence that was adduced in court before he came to the conclusion that he did, in respect of both the appellants, namely Modjtaba and Hamid, and that there was not anything that was wanting in his deliberation of the evidence, so as to invite an interference on the part of this court. It was submitted by learned Mr Deputy that the evidence was overwhelmingly stacked against both the appellants, in view of the undisputed fact that the drugs were found and then retrieved from inside their respective stomach. The apex court case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2000] 1 CLJ 381 was cited in support. In *Tunde's* case the impugned drugs were also swallowed into the accused's stomach and the learned trial judge had found the accused's version of how the drugs in question had been swallowed as being questionable. The learned Mr Deputy had tried to impress before us that similarly, the circumstances as to how the appellants had swallowed the capsules containing the methamphetamine must be viewed as being implausible.

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[16] As could be seen in the preceding paragraphs, there are common issues that had been raised by both Modjtaba and Hamid. There were others that were taken separately from each of them.

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[17] The common issue that was raised was the issue pertaining to the knowledge, or the lack of it, on the part of both the appellants as to the items

A that were found in their respective abdomen and which had to be ‘flushed out’ or rather induced out, at Serdang Hospital in the presence of detective Lans Corp Fairol Anuar bin Bujang (‘SP8’) and Const Abdullah bin Hamzah (‘SP11’). As was borne out by the evidence led by the prosecution, those items could only be seen by way of x-ray examination that was undertaken on both
B the appellants by SP6. Of course, we now had known that, upon due analysis by the chemist, those items that were excreted from both the appellants in the form of capsules, were established to be methamphetamines, a dangerous drug that was listed in the DDA 1952. It was premised on those established facts that both of Modjtaba and Hamid were charged for the offence of drug trafficking.
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[18] But, both their learned counsel before us, had contended that despite the circumstances in which the drugs were found in their abdomens, both of them did not know that the capsules that were retrieved from their bodies were
D in fact dangerous drugs. It was their case that those capsules had contained medication for treatment of dental conditions. Both of them were consistent in their version that while back in Tehran, Iran, they were asked by one man, by the name of Abu Dzal, to swallow those capsules for them then to be brought to Malaysia and that it was so done in order to avoid them having to pay
E customs tax. The trial court was also informed by the appellants that their ticket fares from Tehran to Kuala Lumpur via Damascus in Syria and Doha in Qatar were paid by Abu Dzal and that they were promised by Abu Dzal that they would be given US900 as pocket monies by the person in-charge in Malaysia. Based on these circumstances, it was contended by both appellants
F that both of them had no knowledge that the items that they had been made to swallow by Abu Dzal back in Tehran were indeed dangerous drugs. Premised on that, they had gone on to contend that they, if at all, were mere innocent carriers and therefore they ought to be acquitted of their respective charge.

G [19] The learned Mr Deputy had submitted that it was most unreasonable for any reasonable person to act in the manner which both had acted as alleged by them.

H [20] Now, how did the learned trial judge deal with this issue of knowledge in this case? The answer to that question can be seen very clearly from a perusal of his grounds of decision. We would advert to the relevant portions of his judgement to demonstrate the point.

I [21] We should begin with how he dealt with the issue of possession because possession has as its integral component, the element of knowledge which to be incriminating against an accused person, it must be guilty knowledge and not just mere knowledge per se.

[22] Then we proceeded to look at how the learned judge had deliberated on the evidence of both the appellants in the context of their stated defences in so far as the defence had pertained to the issue of knowledge. The defence of both Modjtaba and Hamid was similar. It was that each of them had lacked the knowledge of the impugned drugs in the capsules, so necessary to be linked to each of them, before possession could attach to them.

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[23] Pertaining to the matter of innocent carrier, learned counsel for Modjtaba referred to the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 which was referred to in the case of *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 6 CLJ 773. The learned trial judge came to the conclusion that neither of the appellants was an innocent carrier.

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[24] At the end of this exercise, the learned trial judge had come to the conclusion that Abu Dzal was a fictitious person, conveniently created by both the appellants as an afterthought. It was indeed incredible, as was found by the learned trial judge that neither one of the appellants was able to furnish the full name and the basic full particulars of Abu Dzal to the investigating officer. Abu Dzal was supposed to have stayed on the same street as the appellants in Tehran in Iran, and yet they expected the investigating officer to launch a full scale investigations into tracing the so-called Abu Dzal in Iran. With respect, the circumstances pertaining to Abu Dzal could not be equated with the circumstances pertaining to Mat in the *Alcontara all Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 case. In the *Alcontara* case, the arresting officer was given contemporaneously by Alcontara, the name and the telephone number of Mat, who was the purported owner and whose name was blurted out by Alcontara as the owner of the gunnysacks found in the boot of the car Alcontara was driving at the time of his arrest. Alcontara had informed the arresting police officer that Mat had told him that the said gunny sacks had contained 'keropok'. In such a circumstance, sufficient notice was give to the police of the particulars of Mat that could then enable them to initiate an investigation into the matter relating to the said Mat, which they did not. Failure on the part of the police in the *Alcontara* case to partake such investigation had amounted, in the view of the apex court, to unfair investigations as it had denied Alcontara of an opportunity to have his version of the story being verified, which if it was confirmed to be true, would have exculpated Alcontara of the offence of drug trafficking. According to Their Lordships, such failure to investigate, in the circumstances of that case, in itself was sufficient, to acquit Alcontara.

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[25] In this case before us, admittedly, no investigations were done by the investigating officer, Insp Eddy Amin bin Hussin Ala ('SP14'). But for a reason, as was explained by SP14 at p 195 Vol 2 of the appeal record as follows:

A S: Rujuk percakapan rakaman D50 mengapa awak tidak siasat kewujudan Abu Dzal.

J: Saya tidak diberitahu secara terperinci di mana lokasi Abu Dzal tinggal dan nama penuh beliau.

B [26] SP14 had told the trial judge further that had he been furnished with the full particulars of Abu Dzal, he could have proceeded to get assistance from the Iranian Embassy here to trace Abu Dzal. In fact, this matter pertaining to Abu Dzal did not end with the examination of SP14 being the investigating officer because, as could be seen in the notes of proceedings, the Iranian interpreter En Mohd Rabiq bin Yaakop, was also examined on the issue and had testified at the trial during reexamination by the prosecution, at p 245 of Vol 2 of the appeal record, like so:

D S: Sekiranya saspek menyatakan maklumat mengenai Abu Dzal seperti alamat dan nombor telefon adakah awak akan terjemahkan?

J: Sudah pasti saya terjemahkan sebab ini melibatkan kredibiliti saya sebagai seorang jurubahasa.

E [27] He reconfirmed that the recorded statements that he had helped interpreted from the both appellants, in the form of D50 and D51 had contained whatever were said by the two appellants when they gave the said statements. Earlier, during cross-examination En Mohd Rabiq had said:

F J: Tidak setuju kerana seingat saya saspek tidak memberi alamat dan telefon Abu Dzal semasa pengambilan statement.

G [28] While on the issue of interpretation of Persian language not having been afforded to the appellants at the KLIA, the evidence from SP5, being the first witness to confront the appellants at the KLIA, he had used simple English language as well as universal sign language to communicate with the appellants. He was satisfied that the appellants were able to respond to his overtures. What is more important to note here is that there was no attempt by the prosecution to admit of anything that was attributable as responses by the appellants to SP5's overtures as incriminating evidence against the appellants in the course of the trial. As such, we found no merits in this complaint by learned counsel.

H [29] Quite apart from that, the evidence in this case had depicted a different scenario, whereby, not only were there no full particulars of Abu Dzal given to the police, even the purported telephone which was alleged to have contained the number of Abu Dzal was not properly dealt with in the trial court. When the prosecution tendered the hand phone as evidence during the prosecution case, the appellants did not object to the same, but during the defence stage, it was alleged by the appellants that the hand phone that was tendered in court by

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the prosecution was not the hand phone that had contained the number of Abu Dzal. In such a circumstance, we could find no reason to fault the learned trial judge when he had ruled against the appellants in that regard.

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[30] To our mind, the learned trial judge directed his mind to the issue at hand and more important still, he had correctly directed his mind in the manner in which he appreciated and determined the issue of knowledge in the context of the circumstances of this case. With respect, we agreed with the manner in which the learned trial judge dealt with the issue of knowledge and that his conclusion that both of the appellants had the requisite knowledge to found possession under s 37(d) of the DDA 1952 had not, in any way necessitated any curial intervention on our part.

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[31] On behalf of the appellant Hamid, it was submitted before us that the trial in the High Court below was a nullity. This issue was unique only to Hamid. It was peculiarly personal to him alone. His learned counsel Puan Suzanawati Ismail, had raised before us that there was no proper consent issued in respect of the charge that was preferred against Hamid. The reason proffered by her being the fact that the consent that was issued was allegedly for the specific offence that pertained only in relation to the impugned event at about 8.41pm on the 7 February 2011 involving 20 capsules, that was said to have incriminated Hamid. Compared to the preferred charge against Hamid, the period of time stated in the charge that was preferred had ranged between 6 February 2011 and 7 February 2011 involving 80 capsules whereby the total quantity of methamphetamine was 343.5g. It was her contention that the want of such consent had rendered the trial in the High Court to be null and void and that any decision, namely the conviction, made by the learned High Court judge at the end of the same proceedings regarding this case was illegal and was of no effect. It was also been urged by learned counsel that the defect that had been occasioned in respect of the charge against Hamid was such that it had amounted to an illegality, which was incapable of cure by the provisions as contained in s 422 of the Criminal Procedure Code. We heard the response from the learned Mr Deputy on this issue and with respect, we agree with him on the true effect of this issue of the alleged absence of consent that was raised by learned counsel for Hamid. In fact, the issue on consent is well-settled. Our law report is rather replete with cases of high authority which had ruled that where the statute under which an accused person was charged required prior consent to prosecute, even a failure to tender the requisition and consent when the accused was charged in court would not be fatal, as long as the charging and the prosecution was done by a deputy public prosecutor. In this regard, we agreed with the submissions of learned Mr Deputy who had referred to us the case of *Public Prosecutor v Jamali bin Adnan* [1985] 1 MLJ 305 where learned Justice Shankar J (as he then was) had occasion to state:

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- A In the case before me the Public Prosecutor is himself prosecuting by his statutory alter ego the Deputy Public Prosecutor. In such a case the Privy Council itself has confirmed in *Public Prosecutor v Oie Hee Koi* [1968] 1 MLJ 148 that where the prosecution was being conducted by the Public Prosecutor himself, consent was implicit.
- B [32] A reference to the case of *Public Prosecutor v Mohd Halipah* [1982] 1 MLJ 155 would yield similar result, as in that case, learned Justice Yusof Abdul Rashid J (as he then was) when faced with a similar issue on consent had also referred to the same Privy Council case of *Oie Hee Koi* and had ruled that
- C consent was implicit if the prosecution was conducted by the public prosecutor or any of his deputies. So, it cannot be clearer than that. In this case, those crucial steps pertaining to the charging and prosecution of Hamid were done by a deputy public prosecutor, the statutory alter ego of the public prosecutor, as evidenced in the notes of proceedings in the appeal records. From the notes
- D of proceedings of this case, the prosecution was conducted by a deputy public prosecutor as can be seen at p 11 Vol 1 of the appeal record as follows: ‘TPR: Pn Faradziah dan Pn Aidatul bagi pihak Pendakwaraya’. They would then proceed to tender the consent and the charge against Hamid (and against Modjtaba).
- E Applying the *Oie Hee Koi*’s ratio of the Privy Council, consent to prosecute Hamid as per the ultimate charge that was preferred against him was therefore implicit.
- F [33] It was also submitted before us that there was a break in the chain of exhibits pertaining to the drugs exhibits. The contention of learned counsel was that the packets bearing the name Serdang Hospital that contained the capsules were not dated nor signed. We had perused through the evidence as they appeared in the notes of proceedings, in particular those emanating from the prosecution witnesses who had handled the relevant exhibits in any
- G material way. Suffice for us to say here that the relevant witnesses had been shown the impugned packets that had contained the capsules after they were retrieved from both the appellants at the Serdang Hospital. We noted from the evidence that the capsules retrieved from each of the appellants’ stomach were separately collected personally by SP7 for the purpose of weighing them as well
- H as for marking purposes of the retrieved capsules. There was from SP7 himself who testified that he did not put any markings on the specimen plastic from Hospital Serdang which he had used to place the respective capsules into. (See p 95 of notes of proceeding Vol 1 record of appeal). Having completed the marking and the weighing of the capsules, SP7 had then handed over the said
- I capsules to the investigating officer SP14. In fact, SP7 had testified that he had cut open a bit part of one capsule retrieved from each appellant in order to see what they contained. SP7 had cut open the capsule that he had marked as A1 (from Modjtaba) and B1 (from Hamid) and in each of them he saw ‘serbuk Kristal warna putih’.

[34] SP7 also testified that he had provided four plastic packets into which he had placed the 60 capsules retrieved from Modjtaba and seven plastic packets into which he had placed the capsules retrieved from Hamid. He identified that P13(4), P13(3), P13(2) and P13(1) to be the plastic packets that he had provided to contain the 60 capsules from Modjtaba. He also identified P14(1)–(7) to be the plastic packets that he had provided into which the 80 capsules retrieved from Hamid were placed. He had also testified that at all material times he had the sole custody of these capsules from the moment he had collected them from the sink after the capsules had been washed by the appellants in the toilet at the Serdang Hospital, until he surrendered them to the SP14, the investigating officer. He had placed them in an ‘almari besi’, to which only he had access. SP7 said he also handed over the two appellants to SP14 after lodging the police report on the matter.

[35] When SP14 received the plastic packets which were not marked by SP7, which had contained the capsules suspected to be drugs, he proceeded to mark them with his own markings, as follows. On the four plastic packets containing capsules from Modjtaba, SP14 had marked them accordingly as EA1, EA1, EA2 and EA3. He did the same in relation to the seven plastic packets containing the capsules retrieved from Hamid, which he marked as EB1-EB7, as can be seen in his evidence, at pp 179 to 181, Vol 2 of the appeal record. He also identified the exhibits in court at trial as the same exhibits that he had received from SP7 through his markings on them.

[36] These same exhibits were subsequently sent by SP14 to Suhana Ismail (‘SP4’) the chemist, for analysis of the contents of the 140 capsules (combined total of 60+80) to determine what the contents were and their respective total weight. The fact that the contents of the said 160 capsules were methamphetamine was not disputed by the defence. Neither was their weight disputed. From the contention of learned counsel, her quarrel would be confined only to the issue of the identity of the exhibits.

[37] To continue from there, SP4 testified in court that she had received the exhibits from SP14 and all the plastic packets containing the capsules were already marked when she received them from SP14. She had identified all the plastic packets that she received from SP14 in open court as can be seen at pp 33–34 and pp 37–41 of notes of proceedings in Vol 1 of the appeal record.

[38] Reverting back to the complaint of learned counsel, she said that there were no signatures or dates on the plastic packets that had contained the capsules. Now, in light of the evidence of the relevant witnesses as adverted to above by us, it is very clear that SP7, SP14 and SP4 were talking of the same plastic packets from Hospital Serdang which SP14 had put on them his own markings as identification. He had identified them again in open court during

- A trial as his markings. The fact that he did not put down the date and his signature on them did not in itself render the said plastic packets susceptible or vulnerable to just any doubt. It is our view that it is the quality of the identification by the witness in court that should matter, not the quantity or number or kinds of the markings that were put on the exhibits. The purpose of
- B putting a marking on an exhibit is solely for the purpose of identification later in court, if such need arises. There is no hard and fast rule that there must be placed on all exhibits the signature and the date by a witness who had handled them, prior. In this case, we had occasion to look at the photographs of the
- C exhibits and the handwritten alphabets that appeared visible on the plastic packets (P4(1)–(32)) had been positively identified by SP14. We did not see anything from the notes of proceedings that showed that SP14 had faced any difficulties when he identified the plastic packets that were shown to him in court. Indeed, he was not vigorously disputed on his identification of the
- D exhibits. We noted that SP14 was cross-examined on the plastic packets from Hospital Serdang, as at p 193 of the notes of proceedings. Apart from eliciting a confirmation from SP14 that the packets were from Hospital Serdang, there was no challenge put to him that what he had received from SP7 and then sent by him to SP4 were not the same plastic packets. Neither was there any
- E challenge put to him that the handwritten alphabets that appeared on the plastic packets were not his. Nor was SP14 questioned during cross-examination, as to why he had not put any date or assign his signature thereon. Most critical, it was never put to him that the plastic packets in issue were not the same ones that he had received from SP7 and subsequently sent
- F over by him to SP4. In the circumstances, the accused persons must be taken to have accepted SP14's testimonies on the said plastic packets.

[39] In the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, the Federal Court had occasion to restate the law as follows:

- G On this point we need only say that there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. (per Raja Azlan Shah CJ (Malaya), as His Royal Highness then was).

- H [40] It is also our respectful view that the decision of the then Federal Court in the case of *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75 is still good law on identification of exhibits and ought to be followed as a sensible guide line on proof of exhibits. In that *Su Ah Ping* case it was ruled by the then Federal Court,
- I through the decision read by Lord President Suffian, like so:

... it is not necessary to call evidence to ensure that there is no break in the chain of evidence. If the officer who picked up the object at the scene produced it and identified it as that very object that is enough and there is no need to call every other officer who handled it, unless there is doubt as to the identity.

[41] In light of the evidence pertaining to the chain of evidence in this case, in particular, the cumulative effect of the evidence coming from SP7, SP14 and SP4, we must therefore reject the complaint by learned counsel as one devoid of any merit.

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[42] Now, reverting back to the issue of knowledge, it is trite that possession, in order to be incriminating or criminal, it must be possession with the necessary mens rea. In other words, it has to be possession with a guilty mind behind it. We would need only to advert to the case of *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 to illustrate the point. In that case, it was stated by the court as follows:

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A movable thing is said to be in the possession of a person when he is so situated to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do it in case of need.

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[43] Knowledge that forms an integral part of possession can either be established through direct evidence or it can be reasonably inferred from the set of circumstances in a given case. Indeed in the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489, it was said at p 506 therein by the court that 'knowledge is to be inferred from the facts and surrounding circumstances of a case'.

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[44] In this case, we noted that the learned trial judge had correctly addressed his mind on the issue of how knowledge of the impugned drugs was to be determined. His reference to the Federal Court case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 was indeed appropriate. In that case, the apex court had said:

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The law is clear and well settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge ...

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[45] It is therefore, to our mind, an area of the law which does not warrant much elucidation. So just by way of reiteration, in order for a person to be guilty of an offence premised on possession, it must be possession that is actuated by a guilty knowledge on the part of the accused person. And whether the accused person has guilty knowledge must relate to the attendant circumstances surrounding the whole case, and whether those circumstances justify a reasonable inference to be drawn therefrom, in the absence of an express admission on his part.

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[46] In his grounds of judgment, the learned trial judge had given the evidence before him the judicial appreciation that was required on it. Having

A done that, he had concluded at p 15 of his grounds of decision as follows:

Pemilikan sesuatu barangan itu meliputi elemen-elemen jagaan/kawalan, pengetahuan dan kuasa/budibicara pengendalian dan pelupusan. Dalam kes ini saya berpuashati bahawa pihak pendakwaan telah berjaya membuktikan kesemua elemen di atas yang ‘incriminate’ OKT-1 dan OKT-2 dengan pemilikan dadah tersebut. Tidak ada keraguan bahawa OKT-1 dan OKT-2 mempunyai pemilikan (possession) ke atas dadah yang dinyahinja daripada usus besar mereka ...

C [47] With respect, we agreed with learned Mr Deputy that the learned trial judge was correct in so holding on the issue of possession of the impugned drugs by Modjtaba and Hamid respectively. From the circumstances obtaining in this case, the undisputed facts have been that the impugned capsules that contained the drugs were flushed out from the abdomen of both the appellants over a period of two days. The capsules were only visible after an x-ray examination was done on the appellants at Hospital Serdang. The fact that the said capsules had been swallowed by both the appellants was undisputed. Thus, each of them had knowledge that they had swallowed those capsules into their respective stomach. The only issue that required determination at trial was whether each of them knew that those capsules which they had swallowed had contained the drug methamphetamine. The fact that these capsules were flushed out or retrieved from the abdomen of the respective appellants was also not a disputed fact. There was no direct evidence of admission from either of the appellants that each of them knew that the capsules that they had swallowed into their stomach had contained the impugned drugs. Their explanations as contained in D50 (in respect of Modjtaba) and D51 (in respect of Hamid), as put to the investigating officer SP14 during his cross-examination at trial, had been that they had swallowed those capsules at the behest of one Abu Dzal. According to Modjtaba, Abu Dzal had told him that the capsules that he had to swallow were a kind of ‘shisa’ and that he would have deliver the same to some individual in Malaysia for which he was promised to be paid for his services. According to him, Abu Dzal had helped him and his family a lot financially and that Abu Dzal had lived within the same locality as him in Iran. He admitted that he had swallowed those capsules in a toilet at the airport in Tehran, Iran. As regards Hamid, he was told by Abu Dzal that what he had swallowed had contained medication, which he had to deliver to an individual in Malaysia and for which he would be paid money but he was not told as to how much he would be paid for his services. Both the appellants denied knowing that what they had swallowed were contraband items such as drugs. In short each of them had swallowed not only the said capsules into their stomach, but together with the capsules, each of the appellants had also ‘swallowed’ the alleged explanation given by the said Abu Dzal.

[48] Given this scenario, the learned trial judge had in determining the element of knowledge on the part of the respective appellant concluded as follows, at pp 11–13 in his grounds of decision, like so:

Pada hemat saya, kedua-dua OKT sememangnya mempunyai pengetahuan berkait dengan dadah tersebut yang telah ditelan dan kemudiannya dinyahtinjakkan daripada perut mereka.

[49] At pp 11–13 therein, the learned trial judge had gone on to say:

... saya berpendapat bahawa kedua-dua OKT telah menelan dadah tersebut dengan penuh kerelaan dan mereka mempunyai pengetahuan yang sepenuhnya apakah jenis barang yang ditelan oleh mereka itu. Adalah mustahil bagi mereka untuk tidak menyelidik terlebih dahulu apa yang ditelan dan risiko yang perlu dihadapi sebelum sanggup untuk menelan kapsul-kapsul tersebut. Keterangan menunjukkan bahawa kedua-dua OKT telah bersusah payah untuk masuk ke Malaysia dengan dadah tersebut di dalam perut mereka dan sanggup untuk menanggung segala risiko ke atas kesihatan dan nyawa mereka dan ini menunjukkan bahawa mereka sedia maklum kapsul yang ditelan adalah mengandungi Methamphetamine.

Sekalipun sekiranya saya mengambil pendekatan untuk menganggap bahawa kedua-dua OKT tidak mempunyai pengetahuan terhadap dadah yang ditelan tersebut, undangundang telah pun mantap bahawa adalah memadai bagi pihak pendakwa untuk membuktikan fakta-fakta tertentu dari mana dengannya satu inferensi boleh dibuat dengan selamat bahawa kedua-dua OKT mempunyai pengetahuan yang diperlukan tentang bahan terlarang yang dibawa atau yang di dalam kawalan, jagaan atau milikan mereka (dalam kes ini bahan yang ditelan tersebut) — sila lihat *Parlan bin Dadeh v PP* [2008] 6 MLJ 19; [2009] 1 CLJ 717; *Emmanuel Yaw Teilor v PP* [2006] 5 MLJ 209; [2006] 3 CLJ 597; *Wong Nam Lai v PP* [1997] 3 MLJ 795; [1998] 1 CLJ 37; *Samurdee Devan Muthu v Krishnan v PP* [2010] 2 MLJ 607; [2010] 3 CLJ 269 dan *PP v Abdul Rahman Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337.

Di atas fakta-fakta dan keterangan-keterangan seperti diperincikan di perenggan-perenggan yang terdahulu jelas sekali kapsul-kapsul tersebut telah 'disorok' sebegitu rupa dengan licik. Ia 'disorok' di dalam perut kedua-dua OKT dan mesin pengimbas tidak dapat mengesan dadah tersebut kerana kedua-dua perut OKT tidak diimbas oleh mesin pengimbas. Penumpang yang normal dan munasabah tidak akan sanggup menaiki penerbangan antarabangsa yang mengambil masa yang lama lagi penuh berisiko ke atas nyawa dan kesihatan mereka (jika kapsul-kapsul tersebut bocor atau pecah dalam perut-perut mereka) dari negara asal ke KLIA dengan ketulanketulan keras pejal kapsul berbalut plastik di dalam perut mereka. Sudah semestinya kapsul-kapsul tersebut ditelan sedemikian rupa dengan kerelaan dan pengetahuan sepenuhnya OKT-1 dan OKT-2 setelah segala risiko dipertimbangkan. Sekiranya OKT-1 dan OKT-2 mengetahui kapsul-kapsul tersebut bukan bahan terlarang (not illegal) maka tidak ada alasan untuk kedua-dua mereka membawa masuk bahan-bahan tersebut dengan cara 'menyorokkan' sedemikian rupa. Kapsul-kapsul tersebut nyata cuba dibawa masuk ke negara ini dengan cara yang amat licik sekali. Hanya kecekapan SP-5 telah berjaya mematahkan cubaan tersebut.

A [50] With respect, to our mind, the learned trial judge had appreciated the evidence necessary to conclude that each of the appellants had the requisite knowledge of the drugs that were contained in the capsules that they had swallowed in Tehran into Malaysia. We were also satisfied that he had come to the correct conclusion that both the appellants had the knowledge about the
B impugned drugs when they swallowed the capsules at the Tehran airport.

[51] As regards the issue of possession, we were also in agreement with the learned trial judge that his conclusion was justified when he said at p 15 of his grounds of decision, like so:
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Tidak ada keraguan bahawa OKT-1 dan OKT-2 mempunyai pemilikan (possession) ke atas dadah yang dinyahtinja daripada usus besar mereka ...

D [52] Prior to that, the learned trial judge had correctly directed himself on the elements required in order to prove possession of a thing, namely control/custody, knowledge, and power of disposal of the same. We agreed with him that the evidence led by the prosecution was sufficient to establish the factum of possession of the impugned drugs on the part of each of the appellants in this case.
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[53] On the issue of trafficking of the impugned drugs by each of the appellants, we were of the view that the learned trial judge was correct when he ruled there that there was sufficient evidence led by the prosecution to invoke the presumption of trafficking under s 37(da)(xvi) of the DDA 1952 as the amount involved had exceeded the statutory threshold as provided therein, namely more than 50g of methamphetamine. The amount of the drugs contained in the 60 capsules carried by Modjtaba was 259.4g and the amount of the drugs in the 80 capsules carried by Hamid was 343.5g. Clearly both
F amounts had exceeded the statutory threshold amount required to trigger the invocation of the presumption on trafficking. In fact, we agreed with the learned trial judge that the manner in which the drugs were transported from Tehran to Kuala Lumpur was proof of the fact of trafficking, following the dictum of Lord Diplock in the case of *Ong Ah Chuan v Public Prosecutor*.
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[54] Premised on the above, we found no merits in the contention by both learned counsel that both the appellants had lacked the necessary knowledge about the impugned drugs that were contained in the capsules that they had admittedly swallowed at the Tehran airport in Iran. In a situation where an accused person is caught with physical control of something, as was clearly the case in this case, a lot of guidance can be had from the speech of Lord Wilberforce in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 where the learned Lord had this to say:
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In all such cases, the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence of possession. It calls for an explanation. The explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession.

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[55] We were also satisfied that the learned trial judge was justified in concluding as he did that the prosecution had established a *prima facie* case as envisaged under s 180(1) of the Criminal Procedure Code, against each of the appellants, pertaining to their respective charge. In the circumstance of this case, both the appellants were rightly ordered by the learned trial judge to enter on their respective defence to the charge that was preferred against each of them.

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[56] We noted that both of the appellants had elected to give sworn testimonies under oath. The complaint of both appellants have been that the learned trial judge had not given the defence of each appellant sufficient judicial appreciation before he concluded that both the appellants were guilty of the drug trafficking offence as charged.

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[57] It would appear that implicit in the defence that was erected by both these appellants had been that they were mere innocent carriers of the impugned drugs as they had been instructed to swallow the capsules by Abu Dzal for which they would be paid by some individual in Kuala Lumpur upon due delivery of the capsules. It was also complained by the appellants that there were no investigations done by the police to verify the truth or otherwise regarding the existence of this person named by the appellants as Abu Dzal in the scheme of things pertaining to this case.

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[58] We had perused the grounds of decision of the learned trial judge on this issue. Suffice to state here that we were satisfied with the manner in which the learned trial judge had dealt with this issue on Abu Dzal in his grounds of decision. He had dealt with the issue of the existence of Abu Dzal together with the implausibility of the appellants' versions as to the lack of knowledge on their part regarding the existence of the drugs in the capsules that both of them had swallowed in Tehran. At p 58 in his grounds of decision, the learned trial judge had concluded as follows:

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Setelah meneliti keterangan kedua-dua OKT dan mempertimbangkan dengan keterangan-keterangan lain yang wujud di dalam kes ini serta meletakkannya di dalam keadaan hal ehwal kes ini secara total, saya mendapati keterangan kedua-dua OKT ini berkenaan watak Abu Dzal adalah keterangan yang berbentuk rekaan

A walaupun ianya dibangkitkan seawal kes pendakwaan dan pada masa yang sama, ianya adalah keterangan berbentuk mere denial sematamata.

B [59] In light of the evidence and our earlier conclusion on similar issue pertaining Abu Dzal, we were of the view that the learned trial judge did not err when he made the above quoted conclusion on the existence of Abu Dzal. We agreed with him that Abu Dzal was an invention and a figment of the appellant's own imagination.

C [60] Quite connected with the Abu Dzal issue would be the issue of the appellants being 'innocent carriers' of the drugs. We found some assistance from the judgment of this court in the case of *Yee Wen Chin v Public Prosecutor & Anor* [2008] 6 MLJ 222; [2008] 6 CLJ 773 in appreciating the true effect of the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073. This court in *Yee Wen Chin* case had said:

D That case (*Mohamad Radzi v PP*) is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial Judge.

E He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the Judge must then determine whether that other person is the real trafficker. This is called the Radhi direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v Public Prosecutor* [1995] 3 CLJ 371 (CA).

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G [61] Applying that so-called 'Radhi direction' to the facts of this case as found by the learned trial judge, we were satisfied that as he had found that Abu Dzal was a mere invention of both the appellants, there was therefore no further need for the learned judge to go one step further to determine whether someone else was the real trafficker. Only in a case where the court was satisfied that there was indeed a real person in existence, as alleged by the accused person, would it become incumbent on the trial judge to embark on such further step 'to determine whether that other person is the real trafficker'.

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I [62] As to the issue that pertained to the absence of an 'overt act' on the part of the appellants thereby nullifying any attachment on any of them the act of trafficking, we were satisfied with the learned judge's finding on the issue when he said in his grounds of decision at p 18:

... dan kemudiannya menelan kapsul-kapsul tersebut di dalam abdomen mereka. Ini mengarahkan kepada satu sahaja inferensi sahaja yakin, perbuatan mereka itu adalah untuk mengedarkan dadah tersebut menurut definasi s 2 ADB apabila mereka transport dadah tersebut masuk ke Malaysia melalui KLIA.

[63] We noted too that there was no evidence coming from either one of the appellants during trial that had challenged the amounts of the drugs that had appeared in the respective charge that was preferred against each of them. Neither was there any evidence from either of the appellants before the trial judge that the drugs were for their own consumption. In fact, both the appellants had denied having anything to do with the drugs. Their defence was a brave defence, indeed. The learned trial judge was therefore correct, upon due appreciation of the evidence of the defence that the appellants had trafficked in the drugs as per charged.

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[64] As regards the statements recorded from the two appellants separately which basically contained their respective defence as enumerated in the preceding paragraphs in this judgment, the learned trial judge had devoted quite a bit of space in his grounds of judgment to address these two documents that had been marked as D50 and D51. As could be seen earlier, both appellants had in their respective statements purportedly described in it what essentially was their defence, whereby the man named Abu Dzal had been given prominent role as the person who had instructed them to swallow the capsules. Yet, in court, in the same breadth, before the learned trial judge, both of them had alleged that both of them were forced to give those statements. It was therefore not surprising to us to note, at pp 64–65 of his grounds of decision when the learned trial judge observed as follows:

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Apa yang lebih menghairankan ialah kedua-dua D50 dan D51 adalah exhibit-exhibit yang dikemukakan oleh kedua-dua OKT dan kedua-dua mereka bergantung sebahagian besar pembelaan mereka kepada dokumen-dokumen ini. Namun kedua-dua mereka sekarang mempertikaikan dokumen-dokumen ini. Malah mendakwa dokumen ini diperolehi setelah dipukul oleh polis dan disediakan tanpa jurubahasa Parsi. Adalah trite bahawa seseorang itu tidak boleh probate dan reprobate pada nafas yang sama.

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[65] We noted that the learned trial judge had also found that there was wilful blindness on the part of the two appellants in respect of the circumstances in which they had tried to deny that they had knowledge of the illegal nature of contents of the capsules that they had swallowed in Tehran. This can be seen at pp 59–60 of his grounds of decision where he had said:

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Kedua-dua OKT mempunyai segala pilihan dan peluang untuk memeriksa dan melihat sendiri kandungan kapsul-kapsul ini dan bertanyakan lebih lanjut tentang ‘ubat’ tersebut dari Abu Dzal namun kedua-dua mereka memilih untuk bersusah payah menelan berpuluh-puluh kapsul tersebut dengan membuta tuli, cukup dengan apa yang diterangkan oleh Abu Dzal tersebut kepada mereka.

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Pilihan yang sedemikian di mana mereka tidak mengambil usaha untuk memeriksa sendiri kandungan kapsul-kapsul tersebut tetapi bergantung sepenuhnya di atas jaminan seseorang tidak berkeupayaan untuk menangkis anggapan bahawa mereka mempunyai pengetahuan sepenuhnya tentang kandungan puluhan kapsul-kapsul yang ditelan oleh mereka. Apa yang berlaku jelas menunjukkan ia ada ‘wilful

- A blindness' sedangkan mereka boleh mengambil langkah-langkah wajar lagi selamat bagi memastikan tidak terlibat dengan gejala menelan dadah tersebut sebagai modus operandi untuk mengedarkannya. Adalah trite bahawa willful blindness bukanlah satu pembelaan — lihat *PP v HLA Win* [1995] 2 SLR 424 di muka surat 438 dan *Hon Bon Tong v PP* di muka surat 272–273 dan *Samad Mohamed Sultan v Pendakwaraya*.
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[66] We saw nothing amiss in that finding which impacted on the denial of knowledge of the contraband items on the part of both the appellants.

- C [67] In the case of *Tunde Apatira* the circumstances pertaining how the drugs were carried by Tunde had an uncanny similarity with the manner how Modjtaba and Hamid had dealt with the capsules that contained the drugs in our instance appeals. In both cases the drugs were found in their stomach. We reproduce here what the justices in the apex court had said in the *Tunde Apatira*
- D case as follows:

- E There is no dispute about the central facts relating to the possession of the drugs. It was established by the evidence and accepted by the learned judge that the drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the drug. The learned trial judge found the appellants' version of how they had come to swallow the drugs in question as being implausible. The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the prescribed drug at the time of their initial detention.

- F [68] Likewise in our instance appeals, the learned trial judge had also in effect found the explanation given by both the appellants to be highly implausible. In the circumstances, having perused the materials placed before us in these appeals, we found that he was not wrong in coming to that conclusion, having judicially appreciated the defence the way he did. With
- G respect, he did not err.

- [69] On the whole, having considered all the submissions by all parties in these appeals before us, we were of the view that the learned trial judge was correct in the way he had addressed the pertinent issues that were before him.
- H He had employed the correct burden of proof that was applicable to both the prosecution and on the appellants. At the end of it all, it was his finding that both the appellants had failed to raise any reasonable doubt on the prosecution case, especially on the factum of possession of the impugned drugs that were found concealed as they were in the capsules that were swallowed into their
- I respective stomach which were later 'flushed out' at Hospital Serdang, after suspicious images of them were seen upon x-ray examination having been performed on them. The learned judge was also satisfied that on careful deliberation of the defence, both the appellants had failed to rebut the presumption of trafficking that was applicable against each of them by virtue of

s 37(da)(xvi) of the DDA 1952. He was satisfied that the prosecution had proven its case against each of the appellants beyond reasonable doubt and he had therefore found them guilty of the charge that was preferred against each of them. He then proceeded on to convict each of them on the respective charge and had sentenced each of them to the mandatory death penalty by hanging. We did not find any error having been committed by the learned trial judge which otherwise would have warranted our curial intervention.

CONCLUSION OF THIS COURT

[70] We therefore had dismissed both appeals, the conviction and sentence of death by hanging as imposed by the learned High Court judge on Modjtaba and Hamid, was thereby, affirmed.

Both appeals dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar

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